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No. 880

In the Supreme Court of the United States

OCTOBER TERM, 1938

**EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRA-
TION AND NATURALIZATION, PETITIONER**

v.

JOSEPH GEORGE STRECKER

**PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT**



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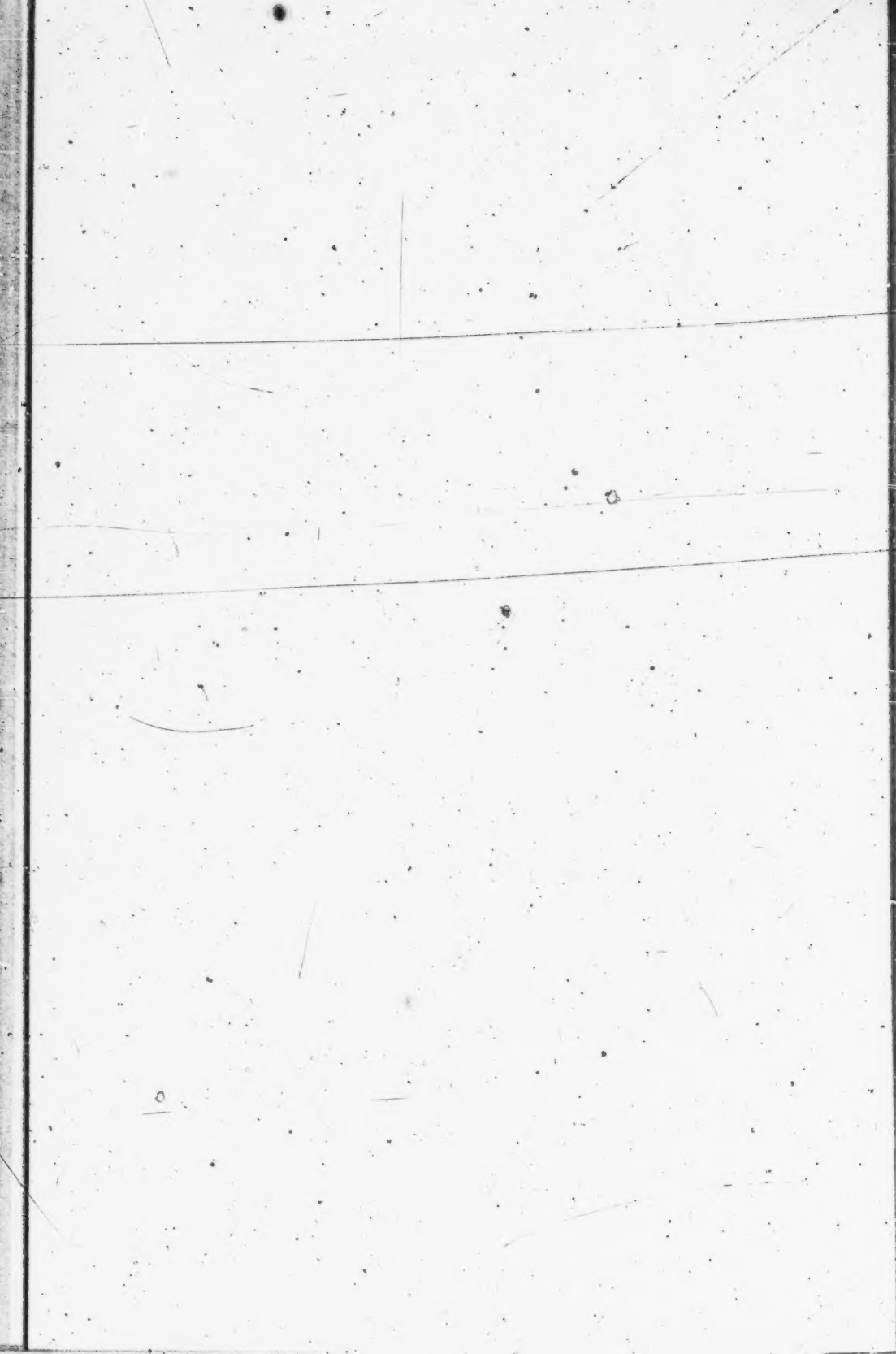
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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 330

EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, PETITIONER

v.

JOSEPH GEORGE STRECKER

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above case on April 6, 1938, and amended on June 7, 1938.

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 110) is reported in 95 F. (2d) 276. The opinion of Sibley, J., dissenting from the denial of rehearing, is printed in the record at p. 117.

JURISDICTION

The original judgment of the Circuit Court of Appeals was entered April 6, 1938 (R. 117). An order denying a petition for rehearing was entered June 7, 1938 (R. 119), and on the same day an order was entered amending the judgment (R. 118). An order denying a second petition for rehearing, which had been filed June 27, 1938 (R. 121), was entered July 27, 1938 (R. 124). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in failing to sustain an order of deportation against respondent, an alien who in 1932 became a member of the Communist Party of the United States.

STATUTE INVOLVED

The relevant provisions of the Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by the Act of June 15, 1920, c. 251, 41 Stat. 1008 (U. S. C., Title 8, Sec. 137), are as follows:

That the following aliens shall be excluded from admission into the United States:

* * * * *

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by

force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage—

(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage—

(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or

causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (d).

Section 2 of the Act of October 16, 1918, *supra*, provides:

SEC. 2. That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the immigration Act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that an alien who in 1932 became a member of the Communist Party is not by reason of that fact subject to deportation under the Act of October 16, 1918, as amended by the Act of June 5, 1920 (U. S. C., Title 8, Sec. 137).

(2) In holding that the evidence before the Secretary of Labor concerning the principles of the

Communist Party was insufficient to sustain the order of deportation.

(3) In remanding the case for a trial *de novo* in the District Court.

(4) In failing to affirm the judgment of the District Court.

STATEMENT

From the agreed statement (R. 8-12) and exhibits the following facts appear: Respondent, a native born subject of Austria, entered the United States in 1912. In 1933 he filed a petition for naturalization, but before completing that process deportation proceedings were begun against him. On November 25, 1933, the Department of Labor issued a warrant for his arrest, charging him with being in the United States in violation of the Act of October 16, 1918, as amended by the Act of June 5, 1920 (U. S. C., Title 8, Sec. 137), in that after his entry he was found to have become a member of one of the classes of aliens enumerated in Section 1 of that Act, as amended, to wit: an alien who is a member of or affiliated with an organization, association, society, or group that believes in, advises, or teaches the overthrow by force and violence of the government of the United States. (R. 8, 12-13.)

Two hearings were afforded respondent under this warrant of arrest. The first was held on January 23, 1934, the respondent being represented by counsel. Evidence introduced by the Govern-

ment in support of the warrant consisted of membership book No. 2844 of the Communist Party of the United States in the name of respondent, a statement made by respondent to an Immigration officer on October 25, 1933 (R. 46-52), and a report of a hearing before the Acting District Director of Naturalization on respondent's application for naturalization (R. 60-67). The second hearing was held on May 8, 1934, respondent again being represented by counsel. The Government offered as additional evidence extracts from a magazine entitled "The Communist" dated April 1934, "a magazine of the Theory and Practice of Marxism-Leninism, published monthly by the Communist Party of the United States of America" (R. 69-74). Respondent produced a number of witnesses who testified to his character and beliefs (R. 74-97), and respondent himself testified at both hearings (R. 15-28, 68-69, 81-88, 97-98), denying certain of the statements contained in his earlier testimony before the Immigration officers which had been introduced in evidence at the first hearing.

On the basis of the record of the above hearings the Secretary of Labor, on August 14, 1934, issued a warrant of deportation against respondent (R. 98-99).

The following matter contained in the record of the hearings is relevant on the question whether there was evidence to support the order of deportation.

Respondent admitted that he joined the Communist Party in November 1932 (R. 20, 65). His membership book showed that he had been admitted on November 15 of that year (R. 19-20, 52-53). No dues stamps were affixed to the membership book for any period subsequent to February 1933 (R. 56). The membership book contained the following extract, among others, from the statutes of the Communist Party of the United States (R. 53, 54).

SEC. 3—MEMBERSHIP

1. A member of the Party can be every person from the age of eighteen up who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A., who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the Comintern and of the Party, and regularly pays his membership dues.

* * * * *

SEC. 4—THE STRUCTURE OF THE PARTY

1. The Communist Party, like all sections of the Comintern is built upon the principle of democratic centralization. These principles are: * * *

(c) Acceptances and carrying out of the decisions of the higher Party committees by the lower Strict Party discipline, and immediate and exact applications of the decisions

of the Executive Committee of the Communist International and of the Central Committee of the Party.

Under the caption "What is the Communist Party?" the membership book states (R. 59):

The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action. (From the program of the Communist International.)

The record of the hearing of October 25, 1933, before an Immigration inspector, introduced at the hearings on the warrant of arrest, shows that respondent testified as follows (R. 50-51): That at the time of his initiation into the Communist Party he was familiar with its intents and purposes; that he acquired prior knowledge of Communism from a study of the writings of Marx over a period of about ten years; that he was in accord with Marx in regard to the social order of things; that the Communist Party of America proposes to destroy capitalism and establish a government by the people similar to that now in existence in Russia; that the leaders of communism say that it will resort

to armed force in the event that it should be necessary; that he would not personally bear arms against the present United States Government "because Communism is not strong enough now."

Among the excerpts read into the record from the periodical "The Communist," published, as stated above, by the Communist Party of America, are the following (R. 73, 74):

"The Party must neither stand aloof from the daily needs and struggles of the working class nor confine its activities exclusively to them. The task of the Party is to utilize these minor everyday needs as a starting point from which to lead the working class to the revolutionary struggle for power."
(C. I. Program.)

* * * * *

In a period of imperialism, to propagate for a proletarian revolution without carrying on propaganda and preparation for the mass political strike and for an armed insurrection of the fight for power, means to disarm the workers in the face of the attack of the bourgeoisie.

* * * * *

"The necessity of systematically fostering among the masses this and just this point of view about violent revolution lies at the root of the whole of Marx' and Engels' teachings. * * * [Lenin, State and Revolution.]

* * * * *

The question of a violent revolution lies at the root of Marx's teachings. Only phil-

istines or downright opportunists can talk about revolution without violence.

Counsel for respondent was asked at the hearings whether he had any documents or other evidence "in rebuttal of this evidence that your membership in the Communist Party constitutes membership in an organization which believes in or teaches the overthrow by force or violence [of] the Government of the United States or all forms of organized government" (R. 74). The evidence thereupon introduced in behalf of the respondent consisted solely of testimony by himself and acquaintances as to his personal character and beliefs (R. 74-97).

On June 25, 1936, respondent filed a petition for writ of *habeas corpus* in the United States District Court for the Eastern District of Arkansas, based on the same ground as the instant application (R. 9). After hearing the evidence Judge Martineau denied the petition and allowed an appeal. The appeal was never perfected but was docketed and dismissed in the Circuit Court of Appeals for the Eighth Circuit (*ibid.*). The instant proceeding was begun a year later, on June 16, 1937, in the District Court for the Eastern District of Louisiana. On consideration of the evidence Judge Borah denied the application for a writ of *habeas corpus* (R. 100).

On appeal, the Circuit Court of Appeals reversed the judgment and remanded the cause to the District Court (R. 110-113). The Court of

Appeals rejected the contention of respondent that the hearings had been unfair, but held that the record did not support the order of deportation, as it was not shown that the Communist Party is now within the statutory definition of proscribed organizations. The court took judicial notice of the fact that the conditions which called for the statutory provision in 1918 and 1920 had changed in respect of the Russian experience and the record of the party. Holmes, J., concurred in the result. A petition for rehearing was denied on June 7, 1938, but the judgment was amended to provide for a trial of the issues *de novo* in the District Court (R. 118). Sibley, J., dissented from the denial of rehearing, stating that a different result might be reached on consideration of the references to the Communist International in the membership book of respondent, together with ordinary knowledge of the program of the Communist International (R. 117-118).

A second petition for rehearing was filed by the Government (pursuant to leave granted by the senior Circuit Judge) taking the position that a trial *de novo* in the District Court was an improper disposition of the case, and renewing the request for a rehearing. This petition was denied on July 27, 1938 (R. 121-122, 124).

REASONS FOR GRANTING THE WRIT

This petition is submitted in order that the Court may resolve the conflict between the decision below

and the decisions of other Circuit Courts of Appeals. The question whether membership by an alien in the Communist Party of America, together with the resulting affiliation with the Communist International, subjects an alien to deportation, was answered by the court below in the negative; as will be shown, other courts have given an affirmative answer. Moreover, the court below regarded the record as lacking in evidence to support a finding that these organizations, at the time of respondent's membership in 1932-1933, advocated or believed in the overthrow of the Government of the United States by force and violence; other courts have sustained orders of deportation on records containing essentially similar evidence.

The lack of uniformity among the circuits will, unless resolved, create a situation both of unfairness to aliens and of confusion in the administration of the law.

The pertinent decisions are stated below by circuits.

First Circuit: In *Murdoch v. Clark*, 53 F. (2d) 155 (1931), the alien was a member of the Workers' Party of America, affiliated with the Communist Party, and of the Trade Union Unity League, affiliated with the Red International Labor Union. After quoting excerpts from a pamphlet of the Trade Union Unity League, the court said (p. 157): "The program of the Red International Labor Union and the Communists is now a matter of general knowledge." In *Sorquist v.*

Ward, 83 F. (2d) 890 (1936), affirming, on the opinion below, 11 F. Supp. 525, the court relied on excerpts in the record from the report of a Congressional investigating committee and a pamphlet containing the program, constitution, and rules of the Communist International, not materially different in substance from the literature in the present record, and the court added (11 F. Supp. 527): "Membership of an alien in or affiliation with the Communist Party has been held sufficient to support a warrant issued by the Department of Labor for such alien's deportation."

Second Circuit: In *United States ex rel. Yokinen v. Commissioner of Immigration*, 57 F. (2d) 707 (1932), certiorari denied, 287 U. S. 607, it was held that an alien who had joined the Communist Party and was later expelled for disagreement with certain of its principles was nevertheless deportable. The court said (p. 707): "The Communist Party is well known to be a group which advocates the overthrow of organized government by force. No claim is made that aliens who are members of it are not subject to deportation." See also *United States ex rel. Ohm v. Perkins*, 79 F. (2d) 533 (1935); *United States ex rel. Fernandes v. Commissioner of Immigration*, 65 F. (2d) 593 (1933).

Third Circuit: In *United States ex rel. Boric v. Marshall*, 67 F. (2d) 1020 (1933), affirming *per curiam* the judgment and opinion below, 4 F. Supp. 965, where the alien was a member of the National Miners Union, shown by documentary evidence to

be affiliated with the Red International of Labor Unions and the Trade Union Unity League, the court sustained an order of deportation, declaring (4 F. Supp. at 967): "It is a matter of common knowledge that the Red International of Labor Unions, and its American branch, Trade Union Unity League, is a body which is opposed to organized government and favors the overthrow of the Government of the United States by force. In numerous decisions by courts judicial notice has been taken of this fact, and the Secretary of Labor has fully as much right to accept common knowledge in this respect as have the courts."

Seventh Circuit: In *Kjar v. Doak*, 61 F. (2d) 566 (1932), certain pamphlets were introduced, similar to the literature in the present record. It appeared that the documents had been published prior to the alien's membership in the Communist Party and in the Trade Union Unity League, and objection was made on that ground to their consideration. In disposing of this objection the court said (p. 569): "In the absence of evidence to the contrary, it will be presumed that the organizations referred to continue to advocate and teach the same principles as are set forth in the documents introduced, all of which were published as late as 1929." In the present case the publication of the Communist Party contained in the record is dated a little more than a year subsequent to the alien's last payment of dues to the party. If the decision below be thought to rest on that ground, it is in conflict with

the *Kjar* case, particularly since no attempt was made by respondent to show that the principles of the party had undergone any pertinent change in the interval. See also *Vajtauer v. Commissioner*, 273 U. S. 103, 110-111.

In the *Kjar* case the court stated (p. 569): "Membership of an alien in, or affiliation with, the Communist Party or the Trade Union Unity League has been held sufficient to support a warrant issued by the Department of Labor for such alien's deportation."

Eighth Circuit: In *Ungar v. Seaman*, 4~~7~~ F. (2d) 80 (1924), the court stated (p. 81): "It is now settled that the Communist party was an organization that entertained a belief in the overthrow by force or violence of the government of the United States and advocated and taught the overthrow by force or violence of all forms of law." In the *Ungar* case the court ordered a new hearing because of procedural irregularities, but the statement quoted is, of course, part of the law of the case, governing the further proceedings therein, and hence in no sense can be regarded as dictum. Subsequently, in *Jurgans v. Seaman*, 25 F. (2d) 35 (1928), it was conceded that the Communist Party was within the definition of the statute, the alien being represented by the same counsel who had appeared in the *Ungar* case.

Ninth Circuit: In *Ex parte Vilarino*, 50 F. (2d) 582 (1931), the nature of the party was held to have

been sufficiently shown by certain publications introduced in evidence,¹ as to which the court said (p. 586):

According to that literature [in evidence], ownership of which was admitted by Vilarino, it is clear that the communists do advocate the overthrow of the government of the United States by force or violence. One or two excerpts from those documents will be sufficient to establish that fact: "The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communist revolution. The proletarians have nothing to lose but their chains. They have a world to win. Working men of all countries, unite!" (From the Communist Manifesto, by Karl Marx and Frederick Engels, page 58.)

The court then quoted from the membership book of the alien, identical with that in the present case, and concluded: "It is clear from the foregoing that the Communist teaching is one of force; it is equally clear that Vilarino, being able to read English, was aware of his party's teaching." And the court added (p. 586): "The doctrines of this group, indeed, have already been passed upon by this court.

¹ In the earlier case of *Ex parte Fierstein*, 41 F. (2d) 53 (1930), the court had held that the principles of the organization could not be established merely by the opinion testimony of a police officer who at one time had been a member.

Kenmotsu v. Nagle, 44 F. (2d) 953, 955." See also *Branch v. Cahill*, 88 F. (2d) 545 (1937).

While the decision of the court below seeks to distinguish apparently conflicting decisions on the ground that they were "all fact cases," the foregoing analysis of the state of the authorities in other circuits shows that a genuine conflict exists. The instant decision cannot be reconciled with the cases in which judicial notice has been taken that the Communist Party falls within the proscription of the statute, and it is also out of harmony with the decisions which have held that evidence that the Communist Party of America is dedicated to the historic teachings of Marx and Engels is sufficient to support a deportation order.

In view of the conflict created by the decision below, and the resulting uncertainty regarding the status of aliens in this class of cases and the administrative procedure to be followed by the Department of Labor, it is believed that a decision by this Court will be in the public interest.

CONCLUSION

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

✓ ROBERT H. JACKSON,
Solicitor General.

GERARD D. REILLY,
Solicitor, Department of Labor.

SEPTEMBER 1938.